Supreme Court, U.S.
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No. 91-1237

In The

Supreme Court of the United States

October Term, 1991

ROBERT L. HAMILTON,

Petitioner,

vs.

AIR JAMAICA, LTD.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Petitioner, Robert L. Hamilton, replies to the respondent's brief in opposition, in order to more truly and correctly frame the issues of this case for review. As a starting point, respondent's perception of the lower court's ruling as a "straight forward application of well-established legal principles" (Brief in Opposition, 5) is a distortion. It was only in 1990 that a Third Circuit court panel including Judge Stapleton and Judge Greenberg, two of the judges who decided this case in the court

below, decided a severance pay case which left unanswered the important question of judging an employer's complete discretionary right to not pay a benefit. *Frank v. Colt Industries Inc.*, 910 F.2d 90, 99-100 (3d Cir. 1990). By the Third Circuit court's own admission, ERISA cases involving severance pay are a "complex area" of the law, *Id.*, at 92.

Furthermore, to characterize Mr. Hamilton's dispute as being with "the substantive content of the plan" which was "accurately disclosed" is a wrong statement (Brief in Opposition, 5). First of all, the reservation of rights which respondent concludes is substantive is inherently procedural; that aspect of the plan has to do with the mechanical operation of the plan, a procedural matter, and it is not a substantive provision discussing a certain benefit. Secondly, even if that disclaimer were accurately disclosed the rest of the plan contained material errors and inaccuracies with respect to severance pay (Brief in Opposition, 3).

The respondent's argument that Robert L. Hamilton's petition is an attempt to have a benefit plan rewritten is also a distortion of the case. On the contrary, petitioner previously indicated that ERISA does not require that certain benefits be offered. Once the benefit is offered, though, as Air Jamaica, Ltd. has done with severance pay, there must be an orderly application of the benefit plan. We cannot forget that it is not the court which is being asked to write or re-write a benefit plan; Air Jamaica, Ltd., itself, started the controversy by writing the plan which did in fact include severance pay.

Respondent insists that the lower court tracked the precise language of the statute in coming to its conclusion that civil remedies for benefits are limited by the terms of the plan (Brief in Opposition, 6). Yet, the lower court never made such an analysis, as cited by respondent (Petition, 8a). Furthermore, the mere creation of a term within a benefit plan which obstructs payment

of a benefit is not enough to disallow Supreme Court review of this case. That term within the benefit plan, the disclaimer clause, must be reviewed for its propriety and legitimacy to insure that the entire benefit plan complies with the statute. Implicit within the statutory provision providing for civil remedies is the correlative requirement upon the employer that the terms of the benefit plan be legal terms.

Respondent is quick to state that Robert L. Hamilton has not pointed to any authority contrary to that cited by respondent. This statement ignores the extensive record for this case which included numerous citations to authority. This petition must be seen initially from an overview, with an eye towards policy. Sufficient authority for that purpose has been provided. A more detailed discussion of authority is better suited for the briefing stage. The futility of being solely authority oriented is best represented by petitioner's citation in his petition for rehearing to the United States Court of Appeals for the Third Circuit. In that petition to the lower court, Mr. Hamilton cited a case for the principle "that every employee may on examining the plan's documents determine exactly what his rights and obligations are under the plan." *Frank v. Colt Industries, Inc.*, 910 F.2d 90, 97 (3d Cir. 1990). Even though the Third Circuit adopted that law which quoted from H.R. Rep. No. 1280, 93d Cong., 2nd Sess. reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 5077-78, the court could not follow its own law in connection with Robert L. Hamilton's appeal; by denying the petition for rehearing, the court held that Mr. Hamilton knew exactly what his rights were under the Air Jamaica Employee Handbook despite the complete ambiguity generated by the disclaimer, undermining the purpose of citing precedent.

Respondent constantly states that Robert L. Hamilton has gone beyond the terms of the plan. Yet, the severance pay benefit description which underlies this action is a term of the plan, too.

It deserves its place in the scales of justice, and must receive a measured weight rather than the *de minimus* treatment that respondent gives it. Even with actual notice of the reservation of rights, we are left with a summary plan description which does not let an employee know where he stands. That flaw is fatal to Air Jamaica's benefit plan, and it is that issue which petitioner has presented for review.

Respondent's revisionist history of the administration of the petitioner's benefit ignores material facts of record. It is incorrect to state that the employee was paid pursuant to the terms of the plan. Air Jamaica did not even know that its employee handbook contained errors in the severance pay section (Brief in Opposition, 3). The employee handbook was not even proof read by the employer. Mr. Hamilton was paid severance pay according to an unwritten company policy (Brief in Opposition, 4). That scenario is what the record supports. For respondent to indicate otherwise is to overly rationalize its conduct in connection with this matter.

Likewise, respondent's understanding of petitioner's preferences is incorrect. Mr. Hamilton did not have a preference for an absolute benefit with no strings attached. He only wanted what was described in detail in his employee handbook. By describing petitioner's petition in terms of a "no strings attached" mentality, respondent actually reveals its own true character. Reviewing the plan description with emphasis on the disclaimer, it is apparent that it was the employer who wanted "no strings attached" authority, and the option of not living up to its word to escape responsibility.

Once again, respondent misstates this case by twisting the petitioner's discussion of accuracy. Respondent would have the Court believe that petitioner defines accuracy as vesting. Petitioner concedes that the current law would allow an employer to change

a benefit plan (Petition, 6). Respondent in effect agrees with petitioner's principal argument by stating that certainty, stability, predictability and precision are a function of the benefit plan itself (Brief in Opposition, 8). That is exactly petitioner's point, noting also that the Air Jamaica, Ltd. plan has no accuracy at all, given the self-created vagueness caused by the reservation of rights.

Finally, respondent insists that even if it inaccurately described the benefit, there still would be no liability based on several cases which hold that, absent bad faith or detrimental reliance, inaccuracies do not entitle a participant to a particular benefit. The fact of the matter is petitioner, Robert L. Hamilton, was paid severance pay according to an unwritten company policy. That distinction is significant as it shows that the respondent is attempting to mischaracterize the case. If this case were designated as one involving the issue of unwritten terms, many a case could be cited for the principle that unwritten terms are not controlling. What it comes down to, then, is the employer's use of the reservation of rights clause, after the fact, to justify its underpayment of benefits pursuant to an unwritten policy. The common thread to these cases, whether viewed as an accuracy/inaccuracy issue or a written/unwritten issue, is that the writing requirement is a central feature of ERISA, and that the writing requirement protects ERISA's plans from the sort of corruption fostered by private oral agreements. *Saret v. Tri Form Corp.*, 662 F. Supp. 312, 316 (N.D. Ill. 1986). The same analysis ought to be applied to Air Jamaica's reservation of rights clause which allows amendment at any time. That purported reservation of rights is actually an attempt to reserve power; it is no better than an unwritten term which the courts view as a "sort of corruption." *Id.*, at 316.

If that is what Air Jamaica's reservation of rights amounts to, then this Honorable Court must strike down that clause, so that ERISA will not be stripped of its central feature, and so

that the important substance and generous spirit of this law will not decay in the corrupt muck of unwritten policy, private verbal agreements, and floating amendments.

Respectfully submitted,

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